INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Reasons for granting the writ	3
Conclusion	8
Appendix A	9
Appendix B	21
Appendix C	29

CITATIONS

Cases:	
Airline-Arista Printing Corp. In re, 156 F. Supp. 403, affirmed *per curiam*, 267 F. 2d 333	6
Boteler v. *Ingels*, 308 U.S. 57	5
Bruning v. *United States*, 376 U.S. 358	6
City of New York v. *Rassner*, 127 F. 2d 703	6
New York v. *Saper*, 336 U.S. 328	3, 4, 5
United States v. *Nicholas*, 346 F. 2d 32	3, 4, 5
Statutes:	
Bankruptcy Act, c. 541, 30 Stat. 544 *et seq.*, as amended:	
Sec. 57j (11 U.S.C. 93(j))	5
Sec. 62 (11 U.S.C. 102)	21
Sec. 64 (11 U.S.C. (1958 ed.) 104)	21
Sec. 64a (11 U.S.C. (1958 ed.) 104(a))	3, 21
Sec. 342 (11 U.S.C. 742)	22
Sec. 343 (11 U.S.C. 743)	22
Sec. 376 (11 U.S.C. 776)	22
Sec. 378 (11 U.S.C. 778)	23
Sec. 378(2) (11 U.S.C. 778(2))	4, 23
Internal Revenue Code of 1954:	
Sec. 3402 (26 U.S.C. 3402)	24
Sec. 3403 (26 U.S.C. 3403)	24
Sec. 3501 (26 U.S.C. 3501)	24
Sec. 3504 (26 U.S.C. 3504)	25
Sec. 6012 (26 U.S.C. 6012)	25

791-756—65——1

Statutes—Continued
Internal Revenue Code of 1954—Continued
Sec. 6601 (26 U.S.C. 6601) 26
Sec. 7501 (26 U.S.C. 7501) 6, 26
28 U.S.C. 960 ..... 6, 24
Miscellaneous:
Treasury Regulations on Employment Tax:
Sec. 31.6071(a)–1 (26 C.F.R., Sec. 31.6071(a)–1) 27
Sec. 31.6151–1 (26 C.F.R., Sec. 31.6151–1) 27, 28

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (Appendix A, *infra*, pp. 9–20) is reported at 346 F. 2d 514.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (App. A, *infra*, p. 20). On August 26, 1965, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including November 1, 1965. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and Section 24c of the Bankruptcy Act.

QUESTION PRESENTED

A debtor in possession operating its business during an arrangement proceeding under Chapter XI of the Bankruptcy Act incurred liability for withheld income taxes on its employees' salaries. The taxes did not become due until after the debtor was adjudicated a bankrupt; the trustee in bankruptcy did not timely pay them. The question presented is whether the trustee is liable for interest on the unpaid taxes to the date of payment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Bankruptcy Act, the Internal Revenue Code of 1954, Title 28 of the United States Code, and Treasury Regulations on Income Tax (1954 Code) are set forth in Appendix B, *infra*, pp. 21–28.

STATEMENT

Seymour Wallas and Company, a corporation, filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on June 24, 1960. Having failed to submit an acceptable plan, the company was adjudicated a bankrupt on March 16, 1961. During the arrangement proceedings the debtor in possession operated the business, and in the first quarter of 1961 it withheld taxes of $6,602.89 on its employees' salaries. These taxes were not due until April 30, 1961, which was subsequent to the adjudication in bankruptcy. The trustee in bankruptcy, however,

failed to file the required quarterly return and to pay the taxes. On November 3, 1961, the government filed in the bankruptcy proceeding a claim for the principal amount of the taxes plus interest until they were paid.[1] R. 3–4, 23–24; App. A, *infra*, pp. 9–10. The referee in bankruptcy allowed the government's claim for taxes but disallowed the claim for interest (R. 22–28),[2] and the district court (R. 32) and the court of appeals affirmed (App. A, *infra*, pp. 9–20).

The court of appeals ruled, as both parties had agreed, that the principal amount of the taxes was properly allowable as an expense of administration, entitled to first priority in payment under Section 64(a) of the Bankruptcy Act (11 U.S.C. 104(a)) (App. A, *infra*, p. 11). But it held (*id.* at 18) that, "[i]n light of the policy enunciated" in *New York* v. *Saper*, 336 U.S. 328, against the allowance of post-bankruptcy interest, the referee properly had denied interest.

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that the United States is not entitled to interest on the taxes that a debtor in possession incurred during a Chapter XI proceeding but which were not due until after bankruptcy occurred, is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Nicholas*, 346 F. 2d 32, pending

[1] The principal amount of the taxes was paid on May 6, 1964, and the accrued interest involved is $1,172.28 (App. A, *infra*, p. 10).

[2] "R." refers to the printed record in the court of appeals.

on petition for certiorari, No. 650, this Term.[3] In the *Nicholas* case, as in the present case, a debtor in possession who operated its business during a Chapter XI proceeding became liable for taxes which it withheld from his employees' wages, but the taxes had not become due until the debtor was adjudicated a bankrupt. The Fifth Circuit ruled that the government was entitled to receive as first priority administration expenses, not only the principal amount of the taxes but also interest (and penalties) thereon to the date of payment. The court pointed out (App. C, *infra*, p. 33) "it is plain that the obligation of the obligation of the trustee here was the same as if he had been in possession from the filing of the original [Chapter] XI proceeding," and that the trustee therefore "is liable to the same obligation to make required returns and payments upon penalty of suffering additions to the tax that a private tax-payer would face."

2. We submit that the court of appeals below erred in rejecting the government's claim for interest. The *Saper* case, upon which the court relied, is plainly distinguishable. *Saper* held only that where a tax liability arose before bankruptcy—*i.e.*, when it was the bankrupt himself rather than the trustee who incurred the liability—the claim did not bear interest for the period between bankruptcy and payment. The present case, however, brings into play Section 378(2) of the Bankruptcy Act (App. B, *infra*, pp. 23–24), which provides that a bankruptcy proceeding fol-

[3] The Fifth Circuit's opinion in *Nicholas* is set forth in Appendix C, *infra*, pp. 29–33.

lowing an unsuccessful Chapter XI proceeding is to be conducted "so far as possible, in the same manner and with like effect as if" a voluntary petition in bankruptcy had been filed and there had been an adjudication of bankruptcy on the day on which the Chapter XI petition was filed. Thus, as the court of appeals pointed out in the *Nicholas* case (App. C, *infra*, p. 33) "it is plain that the obligation of the trustee here was the same as if he had been in possession from the filing of the original [Chapter] XI proceeding."

The pertinent authority, therefore, is not *Saper* but, as the *Nicholas* case held (*ibid.*), *Boteler* v. *Ingels*, 308 U.S. 57. There this Court held that a bankrupt's estate was liable for penalties imposed by State law for non-payment of automobile license fees that a trustee in bankruptcy incurred during operations for the purpose of liquidating the bankrupt's business. The Court ruled (pp. 59–60) that the prohibition in Section 57j of the Bankruptcy Act (11 U.S.C. 93(j)) against the allowance of tax penalties arising prior to bankruptcy was inapplicable, because it applies only if the penalty is "incurred by the bankrupt before bankruptcy by reason of his own delinquency," and there the "fees and penalties at issue were incurred by the trustee in operating the bankrupt business * * *." Since in the present case the trustee is treated as though he took office when the Chapter XI petition was filed, the taxes similarly were "incurred by the trustee in operating the bankrupt business." The court below correctly acknowledged that such taxes were a proper

administration expense of the bankrupt estate, but failed to recognize that because taxes carry interest until paid, the interest also constituted an expense of administration.[4] See *Bruning* v. *United States*, 376 U.S. 358; see also, 28 U.S.C. 960 (App. B, *infra*, p. 24).

3. The issue is of "considerable practical importance in the administration of the Bankruptcy Act"[5] and this Court therefore should resolve the conflict. The question of the government's right to interest on taxes which the debtor incurs while operating his business in the period between the filing of the Chapter XI petition and the adjudication in bankruptcy is likely to arise in a large percentage of the cases in which bankruptcy follows an unsuccessful Chapter XI proceeding. The following table shows that there

---

[4] The government's claim to priority in payment of the taxes themselves—a priority which we believe also covers interest—may also be supported by Section 7501 of the Internal Revenue Code (App. B, *infra*, p. 26). The trustee is required to withhold taxes on his employees' wages and to pay them over to the United States. Section 7501 provides that the amount of taxes thus collected "shall be held to be a special fund in trust for the United States." As an officer of the court, the trustee in bankruptcy was obligated to perform that statutory obligation by turning over the trust fund to the United States as soon as the withheld taxes were due; and thus the United States is entitled to the funds wholly apart from its claim thereto as an administration expense. Cf. *City of New York* v. *Rassner*, 127 F. 2d 703, 706 (C.A. 2), and *In re Airline-Arista Printing Corp.*, 156 F. Supp. 403 (S.D. N.Y.), affirmed *per curiam*, 267 F. 2d 333 (C.A. 2).

[5] *New York* v. *Saper*, 336 U.S. 328, 329.

is a substantial number of such cases which has been increasing in recent years:

Fiscal year ended June 30	Chapter XI proceedings filed	Chapter XI proceedings in which debtor adjudicated bankrupt
1961	947	370
1962	903	412
1963	1,188	485
1964	1,088	604

(Tables of Bankruptcy Statistics, published by the Administrative Office of the United States Courts, for the fiscal years ending June 30, 1961, through 1964, Tables F2 and F4b, and for the fiscal year ending June 30, 1964, pp. 4 and 5.)

Although the issue has not hitherto caused much litigation, this is not a fair indication of its importance. The decision below—the first appellate ruling denying the government's claim to interest in these circumstances—is hardly likely to pass unnoticed by the bankruptcy bar, and it will almost certainly encourage trustees in bankruptcy to oppose such claims. Although most of these claims involve small amounts, their annual total is substantial. Even more important is the fact that, as long as the conflict between the circuits remains, there is likely to be a heavy volume of litigation on the issue. Thus, unless the government were to abandon pressing its claims for interest—and, as shown above, we have sound grounds for believing that our claims are valid—it would be required to conduct extensive litigation on this narrow issue. In the circumstances, it is appropriate for this Court to decide the question and eliminate the uncertainty which the conflict between the circuits has created.

791-756—65——2

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER, 1965.

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 17780

UNITED STATES OF AMERICA, APPELLANT

v.

JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT, APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

(June 4, 1965)

Before VOGEL, MATTHES and RIDGE, Circuit Judges

RIDGE, *Circuit Judge*: The sole question presented by this appeal is whether the United States is entitled to interest until date of payment of withholding taxes which accrued against the debtor while in possession of the business under an arrangement proceeding, and the interest did not begin to run on the tax until after the final adjudication in bankruptcy. Despite this simple statement of the problem here confronting us, the present case requires an exhaustive analysis of the present state of the law regarding post-bankruptcy interest claims. As appellee admits that "Appellant's statement of the case is essentially correct," the following facts are culled therefrom.

Seymour Wallas and Company, a corporation, filed a petition for an "arrangement" on June 24, 1960. Thereafter, it was adjudicated a bankrupt on March 16, 1961, having failed to submit an acceptable plan.

On September 15, 1961, the United States filed a claim for taxes, separated into two claims—one for taxes accruing before the arrangement proceeding,—the other for taxes accruing during the arrangement. The latter claim is the only one in issue here. It was for assessed withholding taxes of $6,602.89 for the first quarter of 1961, plus $202.38 interest to the date of filing the claim, and interest of $1.06 per day thereafter until payment of the principal was made—ultimately on May 6, 1964. These taxes were not required to be reported or paid until April 30, 1961, subsequent to the adjudication in bankruptcy after failure of the arrangement proceeding; hence the interest here did not begin to accrue until that date. The Referee allowed the tax claim in the principal amount of $6,602.89 as an expense of administration of the arrangement proceeding but denied the claim for interest, basing his decision on *City of New York* v. *Saper,* 336 U.S. 328, 69 S. Ct. 554, 93 L. Ed. 710 (1949). On petition for review, the District Court affirmed in an unreported order. This appeal followed.

At the outset we are met with a jurisdictional question, raised by appellee in view of § 24(a) of the Act,[1] which limits appeals in bankruptcy proceedings to matters involving more than $500.00 unless prior allowance of the appeal has been granted by the Court of Appeals. (See Rule 25 of this Court, 28 U.S.C.A., Rules, 8 Cir.) Since appellant claims interest to date of payment, it is readily apparent that substantially more than $500.00 is in issue here, even though the amount claimed was less than that sum at the time of filing the claim.[2] Regardless, this is an appeal

[1] 11 U.S.C.A. § 47(a).

[2] The accrued interest now claimed by the Government amounts to $1,172.28.

which we can, and should, hear in our discretion, in the interest of substantial justice. *R.F.C.* v. *Prudence Group*, 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364 (1941); *New York Credit Men's Adjustment Bureau, Inc.* v. *Strauss & Co.*, 296 F. 2d 702 (2 Cir., 1961). It is of sufficient importance to the future administration of the Bankruptcy Act (hereinafter denominated Act) to warrant our consideration thereof on its merits. *State of California* v. *Renauld & Co.*, 179 F. 2d 605 (9 Cir., 1950).

Neither party questions the allowance of the principal amount of the taxes here considered as a proper expense of administration of the arrangement proceeding, entitled to a first priority under § 64(a)[3] of the Act. They are taxes incurred while the property of the debtor was *in custodia legis* under the administration of the bankruptcy court, and thus are clearly expenses of administration as that term has long been understood. Cf. *Dayton* v. *Stanard*, 241 U.S. 588, 36 S. Ct. 695, 60 L. Ed. 1190 (1916); *State of Missouri* v. *Gleick*, 135 F. 2d 134 (8 Cir., 1943); *United States* v. *Sampsell*, 266 F. 2d 631 (9 Cir., 1959). See also, 3 Collier on Bankruptcy § 64.105, p. 2088. It is appellant's contention that since under normal circumstances interest on unpaid taxes is considered an integral part of a tax liability itself, the interest here in issue should equally share that preferred status unless the fact of bankruptcy on the part of the taxpayer requires a different result.

In bankruptcy matters the Bankruptcy Act takes precedence over other statutes, and governs in any case where there might be conflict. *Guarantee Title & T. Co.* v. *Title Guaranty & S. Co.*, 224 U.S. 152, 32 S.

[3] 11 U.S.C.A., § 104(a).

Ct. 457, 56 L. Ed. 706 (1912); *Adams* v. *O'Malley*, 182 F. 2d 925 (8 Cir., 1950); *United States* v. *Wood*, 290 Fed. 109 (2 Cir., 1923), aff'd 263 U.S. 680, 44 S. Ct. 133, 68 L. Ed. 503. Thus, in the matter of priorities the courts are bound by the terms of the Act, regardless of other statutory preferences. *Missouri* v. *Ross*, 299 U.S. 72, 57 S. Ct. 60, 81 L. Ed. 46 (1936); *Davis* v. *Pringle*, 268 U.S. 315, 45 S. Ct. 549, 69 L. Ed. 974 (1925). Present § 64(a) of the Act, *supra*, represents a clear departure from pre-Chandler Act practice, in that it reduces all costs and expenses of administration to a parity; that is, taxes no longer have a special priority over any other expenses of administration, all of which now share the same priority on an equal basis. *Missouri* v. *Earhart*, 111 F. 2d 992 (8 Cir., 1940); *In re Columbia Ribbon Co.*, 117 F. 2d 999 (3 Cir., 1941). Therefore, our consideration of post-bankruptcy interest in this tax claim can be no different than that of interest accruing generally as cost of administration on other like claims.

Considering interest in connection with bankruptcy, it appears that there is a "* * * long-standing rule against post-bankruptcy interest * * * implicit in our current Bankruptcy Act." *New York* v. *Saper*, l.c. 332. In *Vanston Committee* v. *Green*, 329 U.S. 156, l.c. 163, 67 S. Ct. 237, 91 L. Ed. 162 (1946), the Court stated: "The general rule in bankruptcy * * * has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings." As said in *Bruning* v. *United States*, 376 U.S. 358, at 361–362: "As to claims against the trustee in bankruptcy, the general rule for liquidation of the bankruptcy estate has long been that a creditor will be allowed interest only to the date of the petition in bankruptcy * * *" and that *Saper, supra*, makes the

general rule (applicable) "to claims against the trustee for taxes as well as for other debts." As the Court, in *Vanston Committee* v. *Green,* pointed out, this is a matter of equity * * * the delay in distribution being caused by law, and the estate should not be penalized for the delay by additional interest. In this connection, see *Sexton* v. *Dreyfus,* 219 U.S. 339, 31 S. Ct. 256, 55 L. Ed. 244 (1911); *United States* v. *Bass,* 271 F. 2d 129 (9 Cir., 1959); *Massachusetts* v. *Thompson,* 190 F. 2d 10 (1 Cir., 1951); 3 Collier on Bankruptcy, § 63.16, p. 1858. There is also a matter of administrative convenience, as the very purpose of a "cutoff" or "bar" date would be thwarted if obligations are allowed to accrue past that date, continuing the vicious circle which bankruptcy was designed to terminate. This is not to say that such post-bankruptcy interest may never be allowed, for it is settled that the creditors' rights thereto will be recognized should the estate subsequently prove to be solvent, or should the estate itself subsequently receive income in the form of interest. *United States* v. *Harrington,* 269 F. 2d 719 (4 Cir., 1959). We realize that the foregoing cases deal with interest which began to accrue prior to bankruptcy, on debts likewise accruing. Be that as it may, we think the broad policy and reasons therefor, toward post-bankruptcy interest, should be kept in mind in the consideration of the specific issue in question here.

In the instant case we deal with a debt incurred as an expense of administration by a debtor in possession, the interest on which did not begin to accrue until after a subsequent adjudication in bankruptcy. By virtue of § 378(2)[4] of the Act, the abortive arrange-

[4] 11 U.S.C.A., § 778(2).

ment proceeding and the subsequent bankruptcy are considered parts of a single proceeding so far as possible, and we must not consider the debt here incurred by the debtor in possession as though it were contracted by the trustee during bankruptcy.

There is no question, of course, that a trustee is liable for taxes incurred during the administration of the estate, whether resulting from continuing to do business, or simple ad valorem taxes on the property in the estate. *Boteler* v. *Ingels,* 308 U.S. 57, 60 S. Ct. 29, 84 L. Ed. 78 (1939); *In re Chicago & N.W. Ry. Co.,* 119 F. 2d 971 (7 Cir., 1941); *State of Missouri* v. *Earhart, supra.* Here, the question very simply is whether the Government is entitled to interest on such taxes after straight bankruptcy has been adjudicated until the date of payment of the taxes accruing during a prior arrangement proceeding.

In 1949, the Supreme Court handed down the decision in *City of New York* v. *Saper, Supra.* Since that time, the *Saper* decision has been variously considered in lower federal courts on numerous occasions. Such cases, of which the present is apparently the latest, involved the contention that the very broad language of *Saper* should be restricted to the specific situation involved there, but it should be noted that in each case thereafter the courts have taken the language of *Saper* at face value and accepted the rationale thereof, wherever logically required to do so. See, for example, *United States* v. *General Engineering & Mfg. Co.,* 188 F. 2d 80 (8 Cir., 1951), aff'd 342 U.S. 912, 72 S. Ct. 357, 96 L. Ed. 682; *United States* v. *Edens,* 189 F. 2d 876 (4 Cir., 1951), aff'd 342 U.S. 912; *State of New York* v. *Feinberg,* 204 F. 2d 502 (2 Cir., 1953).

The *Saper* case involved the question of post-bankruptcy interest on taxes accruing prior to straight bankruptcy. The Court, in denying such interest, noted that prior to the Chandler Act, interest was commonly allowed, based on the especially preferred status of taxes under the Act of 1898, and further, that lower federal courts had continued to do so even after the Chandler Act. However, in *Saper* it clearly held such practice to be in error, as being in violation of the long-standing bankruptcy tradition that accrual of interest against the estate ceases on the inception of bankruptcy as a matter of equity and practicality. Each of the cases subsequently considering *Saper* have likewise been concerned with straight pre-bankruptcy tax debts, and we are not cited to, nor have we found any subsequent cases specifically dealing with an issue situation such as here present. We think it necessary to remember, however, that the Court in *Saper* considered with favor the "long-standing rule" against post-bankruptcy interest based on equitable considerations.

Appellant asserts that *Boteler* v. *Ingels, supra,* is authority for allowance of the interest attempted to be collected here. In that case the Court held that a trustee in bankruptcy was liable for state penalties imposed for nonpayment of automobile license fees when the fees and penalties accrued during the operation of the business by the trustees for purposes of liquidation. We are also referred to *In re Chicago & N.W. Ry. Co., supra,* holding, on the authority of *Boteler,* an estate in bankruptcy was liable for the penalties on overdue state taxes accruing after the institution of the bankruptcy proceedings. Both of the above cases were mainly premised on the pro-

visions of the predecessor statute of 28 U.S.C.A., § 960, which provided generally the same as present § 960.[5] The reasoning of the Court in the above-cited cases was that § 57(j)[6] was applicable only to penalties incurred by the bankrupt individually prior to bankruptcy, and that it was not applicable to penalties brought on by the action of the trustee himself. In such instance, the provisions of § 960 of Title 28 were held to prevail. Without speculating as to the "intent" of the Supreme Court in *Saper* (which opinion did not mention *Boteler*), we believe the present case to be distinguishable from *Boteler,* and to come under the reasoning laid down in *Saper* without doing violence to *Boteler.* Our understanding of *Boteler* is that it holds simply that a trustee operating a business is subject to tax statutes, the same as any other citizen, and subject to penalties if he does not comply with the law. Such is not the issue in the present case.

Here, we deal with "interest" after adjudication, within the concept of "* * * compensation for the use or forbearance of money." *Deputy* v. *duPont,* 308 U.S. 488, 498, 60 S. Ct. 363, 84 L. Ed. 416 (1940); *C.I.R.* v. *Meyer,* 139 F. 2d 256 (6 Cir., 1943). *Boteler* deals with a "penalty" as punishment for wrongdoing. *United States* v. *Chouteau,* 102 U.S. 603, 26 L. Ed. 246 (1881); *Unemployment Reserves Commission* v. *Meilink,* 116 F. 2d 330 (9 Cir., 1940). The long-

[5] "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C.A. § 960.

[6] 11 U.S.C.A., § 93(j).

standing rule followed in *Saper* is concerned with interest after adjudication, not penalties as accrued in *Boteler*. Certainly, no argument can be made that malfeasance by a trustee in bankruptcy is never to be allowed pecuniary reimbursement in a bankrupt estate, to the extent of actual loss caused thereby, if the trustee undertakes to act contrary to law. This is what is ruled in *Boteler*. Here, appellant's claim is wholly related to the concept of interest (i.e. reimbursement for the use of money), which interest commenced to run after the date of adjudication in bankruptcy. True, the statute *supra* gives taxes a priority * * * and they are to be paid as soon as possible * * *. If not so paid in a straight bankruptcy proceeding, any delay therefor can only be traced as caused by the law, not by the bankruptcy estate. This is the important distinction we find in the facts here. Paying taxes at the normal distribution time for debts of like priority, as ordered by the Court, creates quite a different situation than the affirmative violation of operating motor vehicles on the highways of a state without paying the necessary state motor vehicles license taxes.

Bruning v. *United States, supra,* does not require a *contra* ruling. There, interest on tax claims for the period from the filing of a petition in bankruptcy to the date of payment of the principal tax claim was recovered by the Government out of assets personally acquired by the tax debtor *after* his adjudication of bankruptcy, in the light of § 6873(a) of the Internal Revenue Code of 1954 (26 U.S.C.A. § 6873(a)). The facts and applicable law in *Bruning* do not militate against the ruling made in *Saper*. As the Court points up in *Bruning*, that "case concerns the debtor's personal liability for post-petition interest on a debt for taxes which survives bankruptcy to the extent that

(the tax) is not paid out of the estate." (Par. added.) 376 U.S., l.c. 362. Here, we are concerned with pro rata distribution of assets of a bankrupt's estate among preferred creditors, having equal priority as required by § 64(a) of the Bankrupt Act, *supra.*

Appellant's argument that this interest should be enforced because of the trustee's willful refusal to pay the tax immediately when due, is without merit. The Government, as a creditor in bankruptcy, occupies no favored position over other creditors of like priority. *State of Missouri* v. *Earhart; supra.* There is nothing in this record to suggest that the tax in question was not given the same consideration as other costs of administration which occupied the same priority. To allow this interest would be in effect to charge the estate with interest, because the trustee complied with the terms of the Bankruptcy Act and refused to give the taxes a special priority not sanctioned by the Act. Allowing this interest would be to place the trustee in the unenviable position of being forced to choose between his responsibility to conserve the estate, and creating a new priority for taxes, or strictly abiding by the statutory scheme for the payment of all debts of equal priority in bankruptcy estates.

Whether the tax accrued before bankruptcy or subsequent thereto, the evil propagated by continually accruing interest remains the same. In neither case is it logical to charge a bankrupt estate a fee for the use of money when it is the force of law which prevents the return of the principal to the creditor, rather than the desire of the debtor to retain its use. In light of the policy enunciated in *Saper,* we believe the referee was correct in denying interest on this tax claim. *Collectibility of Post-Bankruptcy Interest,*

by Max Schwartz, Vol. 36, No. 2, p. 49, Jour. Nat'l Ass'n of Referees in Bankr.

In the alternative, the Government asserts that by virtue of § 7501(a)[7] of the Internal Revenue Code of 1954, the principal amount of the tax here withheld, and the interest thereon, constitute a trust fund in the hands of the trustee to which the United States as *cestui* has an absolute right, independent of any questions of priority, citing: *City of New York* v. *Rassner,* 127 F. 2d 703 (2 Cir., 1942), construing a city ordinance making the vendor a trustee when collecting city sales tax from vendees; and *United States* v. *Sampsell,* 193 F. 2d 154 (9 Cir., 1951), construing the predecessor statute of present § 7501(a), *supra; Hercules Service Parts Corp.* v. *United States,* 202 F. 2d 938 (6 Cir., 1953), as to withholding tax; and *In re Airline-Arista Printing Corp.,* 156 F. Supp. 403 (D.C.N.Y., 1957), aff'd 267 F. 2d 333, also concerning withholding tax. These cases, all following *New York* v. *Rassner, supra,* hold that withheld tax funds constitute trust funds in favor of the taxing authority. Although the argument against allowing such statutory trusts to change the scheme of priorities in the Act is quite convincing,[8] we do not believe that question is present in this case. Whether or not these withheld funds constituted a trust fund for the benefit of the United States is rendered moot by the fact that the principal of the fund is not in issue here, and has in fact been paid over to the Government. As we have determined that the Govern-

[7] "(a) GENERAL RULE.—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States * * *."

[8] See Note 27, p. 2066, 3 Collier on Bankruptcy.

ment is not entitled to interest as here claimed, there are no further funds in issue, and thus no reason to reach the question as to whether or not a trust was so created.

For the reasons noted, the decree of the referee as adopted by the District Court is

Affirmed.

A true copy.

Attest: ROBERT C. TUCKER.

Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals for the Eighth Circuit

No. 17780. September Term, 1964

UNITED STATES OF AMERICA, APPELLANT

v.

JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Decree of the Referee in Bankruptcy as adopted by the District Court by its Order of April 21st, 1964, be, and the same is hereby, affirmed.

JUNE 4, 1965.

APPENDIX B

Bankruptcy Act, c. 541, 30 Stat. 544, *et seq.*:

Sec. 62 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 872, and Sec. 11(a), Act of June 28, 1946, c. 512, 60 Stat. 323, 329]. *Expenses of Administering Estates; Unauthorized Sharing of Fees; Withholding Allowances.*—a. (1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

* * * * *

[11 U.S.C. 102.]

Sec. 64 [as amended by Sec. 1, Act of June 22, 1938, *supra* at 879, and Sec. 19(a), Act of July 7, 1952, c. 579, 66 Stat. 420, 426]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * the costs and expenses of administration, * * *: *Provided, however,* That where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs

and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; * * *.

* * * * *

[11 U.S.C. (1958 ed.) 104.]

Sec. 342. [as added by Sec. 1, Act of June 22, 1938, *supra* at 909]. Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.
[11 U.S.C. 742.]

Sec. 343 [as added by Sec. 1, Act of June 22, 1938, *supra*]. The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.
[11 U.S.C. 743.]

Sec. 376 [as added by Sec. 1, Act of June 22, 1938, *supra* at 912, and amended by Sec. 8, Act of August 23, 1958, P.L. 85–732, 72 Stat. 820, 821]. If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this Act, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or

is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 321 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: *Provided, however,* That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

[11 U.S.C. 776.]

Sec. 378 [as added by Sec. 1, Act of June 22, 1938, supra at 913]. Upon the entry of an order directing that bankruptcy be proceeded with—

(1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; and

(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered

on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act.

[11 U.S.C. 778.]

28 U.S.C.:

§ 960. *Tax liability*

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

Internal Revenue Code of 1954:

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages a tax * * *.

* * * * *

[26 U.S.C. 3402.]

SEC. 3403. LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

[26 U.S.C. 3403.]

SEC. 3501. COLLECTION AND PAYMENT OF TAXES.

The taxes imposed by this subtitle shall be collected by the Secretary or his delegate and shall be paid into the Treasury of the United States as internal-revenue collections.

[26 U.S.C. 3501.]

SEC. 3504 [As amended by Sec. 71, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, 1660]. ACTS TO BE PERFORMED BY AGENTS.

In case a fiduciary, agent, or other person has the control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees, employed by one or more employers, the Secretary or his delegate, under regulations prescribed by him, is authorized to designate such fiduciary, agent, or other person to perform such acts as are required of employers under this title and as the Secretary or his delegate may specify. Except as may be otherwise prescribed by the Secretary or his delegate, all provisions of law (including penalties) applicable in respect of an employer shall be applicable to a fiduciary, agent, or other person so designated but, except as so provided, the employer for whom such fiduciary, agent, or other person acts shall remain subject to the provisions of law (including penalties) applicable in respect of employers.
[26 U.S.C. 3504.]

SEC. 6012. PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

* * * * *

(b) *Returns made by fiduciaries and receivers.*

* * * * *

(3) *Receivers, trustees and assignees for corporations.*—In a case where a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver,

trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

* * * * * *

[26 U.S.C. 6012.]

SEC. 6601. INTEREST ON UNDERPAYMENT, NONPAYMENT, OR EXTENSIONS OF TIME FOR PAYMENT, OF TAX.

(a) *General Rule.*—If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 6 percent per annum shall be paid for the period from such last date to the date paid.

* * * * * *

[26 U.S.C. 6601.]

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General Rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(b) *Penalties.*—

For penalties applicable to violations of this section, see sections 6672 and 7202.

[26 U.S.C. 7501.]

Treasury Regulations on Employment Tax (1954 Code):

§ 31.6071(a)–1 *Time for filing returns and other documents.*

(a) *Federal Insurance Contributions Act and income tax withheld from wages*—(1) *Quarterly or annual returns.* Each return required to be made under § 31.6011(a)–1, in respect of the taxes imposed by the Federal Insurance Contributions Act, or required to be made under § 31.6011(a)–4, in respect of income tax withheld, shall be filed on or before the last day of the first calendar month following the period for which it is made. However, any such return may be filed on or before the tenth day of the second calendar month following such period if such return is accompanied by depositary receipts, Form 450, showing timely deposits in full payment of such taxes due for such period. For the purpose of the preceding sentence, a deposit which is not required to be made within such return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of the deposit for any month will be determined by the earliest date stamped on the validated Form 450 by an authorized commercial bank or by a Federal Reserve Bank.

* * * * *

[26 C.F.R., Sec. 31.6071(a)–1.]

§ 31.6151–1 *Time for paying tax.*

(a) *In general.* The tax required to be reported on each tax return required under this subpart is due and payable to the district director at the time prescribed in § 31.6071(a)–1 for filing such return. See the applicable sections of 26 CFR Part 301 (Regulations on Procedure and Administration), for provisions relating to interest on underpayments, additions to tax, and penalties.

(b) *Use of Government depositaries.* For provisions relating to the use of Federal Reserve banks and authorized commercial banks in depositing the taxes, see §§ 31.6302(c)–1 and 31.6302(c)–2.

[26 C.F.R., Sec. 31.6151–1.]

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 21777

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN NICHOLAS, TRUSTEE OF THE ESTATE OF BEACHCOMBER MOTEL, INC., BANKRUPT, APPELLEE

Appeal from the United States District Court for the Southern District of Florida

(May 25, 1965)

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges

TUTTLE, *Chief Judge:* On August 6, 1958, Beachcomber Motel, Inc., filed a petition for an arrangement proceeding under Chapter XI of the Bankruptcy Act. It was permitted to retain possession of the property as Debtor in Possession until, upon failure to submit an acceptable plan, the company was adjudicated a bankrupt on September 17, 1958. During the intervening period of operation, the Debtor in Possession failed to make payment of certain taxes that accrued during this short period of operation. In fact, under the statute, the taxes that were collected or withheld for the quarter ending September 30, 1958, were not required to be included in returns to be filed until October 31, 1958. Others were to be returned by January 31, 1959. By this time, of course, the Trustee in Bankruptcy had suc-

ceeded to the duties of the former Debtor in Possession.

The Trustee failed to make the required returns and the Government filed an administrative expense statement of the taxes due covering the following amounts: $519.89 of withholding and FICA taxes (Federal Insurance Contributions Act) accruing between August 6, 1958, when the petition for arrangement was filed and September 17, 1958, when the taxpayer was adjudicated a bankrupt; $644 of cabaret excise taxes also accruing between the same dates, and $362.29 of FUTA (Federal Unemployment Tax Act) accruing during 1958. The aggregate of these items is $1,526.18.

Additionally, the United States stated as administrative expense, assessed interest on each of the three principal items above set forth in the amounts of $101.54, $17.58, and $4.46, respectively, totalling $123.58. These two sums, $1,526.18 principal amount of tax and assessed interest of $123.58, totalling $1,649.76, were allowed by the referee as an administrative tax claim entitled to first priority.

However, the referee sustained the trustee's objection to the Government's claim No. 51 as to the amounts set forth as alleged penalties and accrued interest. Thus, the referee disallowed the following amounts contained in the Government's administrative expense statement of taxes due; namely, assessed penalty on the withholding and FICA taxes in the amount of $129.97, on the excise taxes in the amount of $161, and on the FUTA in the amount of $54.34, aggregating $345.31. The referee also disallowed interest after the date of the assessment and accrued to April 10, 1963 (the day before the date of filing of Claim No. 51) on the withholding and FICA taxes in the sum of $46.34, on the amount of excise taxes in the sum of $192.35, and on the amount of FUTA

taxes in the sum of $99.55, totalling $338.24. Claim No. 51 also sought interest on the amounts due at the rate of 31 cents per day from April 11, 1963, the date of the filing of the claim.

The referee, as already stated, allowed as an administrative expense entitled to a first priority the principal amounts of the taxes and assessed interest. Thus, the only controversy here is with respect to his disallowance of the items of assessed penalties totalling $345.31 and interest accrued after the date of assessment, totalling $338.24, in all, $683.55 together with interest from April 11, 1963.

Upon a petition for review filed by the United States from the disallowance of these penalties and interest, the District Court affirmed the order of the referee.

As the Government points out, the distinction between taxes which accrue against a taxpayer prior to bankruptcy and those which accrue against a trustee after bankruptcy, has become well settled. Pre-bankruptcy taxes are payable as tax claims against the bankrupt's estate under § 57 of the Bankruptcy Act. 11 U.S.C.A. § 93. They are entitled to payment as of the Fourth priority under § 64a of the Act, 11 U.S.C.A. § 104. If, however, a trustee becomes subject to taxes as a result of operations carried on after bankruptcy, these taxes constitute an expense of administration under § 62a of the Act and, as such, are payable as a First priority under § 64a.

The duty of the trustee in bankruptcy to pay taxes which accrue during the course of his administration, independent of tax claims which had accrued prior to bankruptcy, has long been recognized by the Supreme Court. See *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334. Here, of course, the referee recognized this obligation, and properly required the payment of the principal amount of the taxes as an expense of admin-

istration. He drew the line, however, at the payment of interest on this principal amount of the taxes and additions to the tax, commonly called a penalty, arising from the failure of the trustee to make the necessary returns and payments on time.

The trustee here contends that since the taxes accrued while the Debtor in Possession was operating the corporation later to become bankrupt, rather than the trustee after bankruptcy, the taxes that accrued during this period should be treated as pre-bankruptcy taxes as should also, of course, the interest and penalties, if they are payable at all, when the failure to make the proper returns and payments is a failure of the bankruptcy trustee. As the Government points out, however, when a debtor is permitted to retain his possession under a Chapter XI arrangement proceeding, he is, within contemplation of the law, just like a trustee, certainly to the extent of his obligation and duty to do the things that the statute would require of a trustee in possession. In fact, where a plan for arrangement turns out to be unsuccessful and an adjudication of bankruptcy is entered, § 3782 of the Act provides that "the proceedings shall be conducted, so far as possible, in the same manner and with like effect, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this Chapter was filed; * * *" 11 U.S.C. § 778. See *United States* v. *Sampsell*, 9 Cir., 193 F. 2d 154. See also 8 Coll. on Bankruptcy (14 Ed. 1963 Rev. Secs. 6.31 and 6.32 which states "the general purpose of § 342 is that where a debtor continues in possession of his property, he shall be in fact a trustee. 'Its position as debtor, continued in possession, is for all practical purposes that of a trustee or receiver * * *'

'A debtor continued in possession by court order is a court officer anologous to a receiver or trustee.' A debtor in possession 'has all the powers of an ordinary trustee * * *'"

Thus, it is plain that the obligation of the trustee here was the same as if he had been in possession from the filing of the original Section XI proceedings. This being the case, it appears that the leading decision *Boteler* v. *Ingels,* 308 U.S. 57, answers the basic question whether the trustee is liable to the same obligation to make required returns and payments upon penalty of suffering additions to the tax that a private tax-payer would face. We think it clear that he is so subject. The Supreme Court said in that case, "if businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. However, petitioners contention would exempt a trustee operating a business in bankruptcy from this double-tax liability which other delinquents must bear. A state would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment." (p. 61)

We conclude that the principle announced in the *Boteler* case clearly applies here to the federal impositions. Thus, it follows that the referee and the trial court erred in not including the items listed above as costs and expenses of administration and thus payable under the First priority.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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No. 711.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

UNITED STATES OF AMERICA,
Petitioner,

v.

JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MEMORANDUM FOR JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT, RESPONDENT.

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No. 711.

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MEMORANDUM FOR JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT, RESPONDENT.

We agree that there is a conflict between the decision of the Fifth Circuit Court of Appeals in United States v. Nicholas, 346 F. (2d) 32, and with the decision of the Eighth Circuit in this case. Whether the conflict is of sufficient importance to justify certiorari of course is for this Court to decide. We respectfully suggest that if certiorari is granted in one case it should be granted in both.

We have two comments upon the Government's position.

In the petition in this case on page 3 of the petition the assertion is made that the Eighth Circuit Court of Appeals ruled that the principal amount of the tax "was properly allowable as an expense of administration, entitled to first priority in payment under Section 64 (a) of

the Bankruptcy Act." This is a technically correct statement, but is to some extent misleading. Where a Chapter XI proceeding is superseded by an adjudication and a liquidation in straight bankruptcy, all other costs and expenses of administration are likewise entitled to the same priority and are on a parity with the claim of the United States as the Eighth Circuit decision points out (see petition of the United States at page 12). The United States has no priority over other costs of administration.

Our second comment relates to the suggestion of the Government, in the last paragraph on page 3 of its memorandum on the petition for certiorari in the Nicholas case (No. 650). The statement is made that the Court should defer action in this case until the Nicholas case is determined. We take the position that if certiorari is granted in one case, it should be granted in both, and that both should be heard at the same time. The Eighth Circuit had before it the decision in the Nicholas case at the time of its decision in this case; the Department of Justice furnished copies to the Judges of the Eighth Circuit. But the Court believed that the Nicholas case was not sound and declined to follow it. There was no conflict until the decision in Kalishman. Irrespective of the motive behind the suggestion, we venture that the recommendation of petitioner that the Nicholas case be heard first and the Kalishman case be deferred, is neither sound nor valid, and that in the interests of justice both cases should be heard together in the event certiorari be granted in either.

Respectfully submitted,

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November, 1965.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 711

JOHN NICHOLAS, Trustee of the Estate of BEACHCOMBER MOTEL, INC., Bankrupt,

vs.

UNITED STATES OF AMERICA.

BRIEF

On Behalf of Jerome Kalishman, Trustee in Bankruptcy of Seymour Wallas and Company, Bankrupt, Respondent in Cause No. 711, October Term, 1965, as Amicus Curiae.

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INDEX.

	Page
Interest of Jerome Kalishman, Trustee in Bankruptcy of Seymour Wallas and Company, bankrupt	1
The question presented	2
Statement of the case	3
Argument	4
A. Where a Chapter proceeding in bankruptcy is superseded by an adjudication, all costs of administration including taxes incurred during the operations of the debtor-in-possession are on a parity	4
B. In bankruptcy, claims for priority are strictly construed, and usually the prompt payment of the principal amount of the government's claim is impossible	5
C. It is inequitable for a bankruptcy court to allow post-bankruptcy interest on tax claims where the burden of the payment would fall upon other creditors	10
D. In determining whether interest on tax claims is allowable in bankruptcy proceedings, the provisions of the Bankruptcy Act rather than of the Internal Revenue Code govern	14
E. The claim of the United States for interest cannot be sustained on the theory of a trust since the Trustee in Bankruptcy acquired no trust funds	19
F. Section 378 of the Bankruptcy Act has no application to the situation here before the court	21
Conclusion	22
Appendix I—Section 3466 of the Revised Statutes of the United States	23
Appendix II—Section 3670 of the 1939 Revenue Act	23
Appendix III—Section 3671 of the 1939 Revenue Act	23

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Adams v. Champion, 294 U. S. 231, 238, 79 L. Ed. 880, 884, 55 S. Ct. 399 20
Beecher v. Leavenworth State Bank, 192 F. (2d) 10 12
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City of New York v. Saper, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554 10
Columbia Aircraft Company v. United States, 163 F. Supp. 932 12
Davis v. Pringle, 268 U. S. 315, 69 L. Ed. 974, 45 S. Ct. 549 .....9, 16
Dudley v. Richards (C. C. A. 8), 18 F. (2d) 876 20
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Hanna v. Consolidated School Dist. No. 1 (C. C. A. 8), 78 F. (2d) 374 20
Hoffman v. Rauch, 300 U. S. 255, 258, 81 L. Ed. 629, 631, 57 S. Ct. 446 21
In re Airline-Arista Printing Corp. (D. C. N. Y), 156 F. Supp. 403 19
In re Cameron (D. C. Calif.), 166 F. Supp. 400, aff'd 271 F. (2d) 129 12
In re Chicago & N. W. Ry. Co. (C. C. A. 7), 119 F. (2d) 971, decided in 1941 18
In re Columbia Ribbon Co. (C. C. A. 3), 117 F. (2d) 999, 1001 5
In re Flayton (D. C. N. Y.), 42 F. Supp. 1002, decided in 1942 18

In re Huff Co., 96 F. Supp. 701 (D. C. Mich.) 11
In re Industrial Machine & Supply Co. (D. C. Pa.), 112 F. Supp. 261 12
In re Inland Gas Corporation, 241 F. (2d) 374 11
In re International Power Securities Corp. (D. C. N. J.), 109 F. Supp. 544 18
In re Kerber Packing Company (C. C. A. 7), 276 F. (2d) 245 .....12, 14
In re Lambertsville Rubber Co. (C. C. A. 3), 111 F. (2d) 45 5
In re Ten Eyck Co., Inc., 40 F. Supp. 270 16
In re Tom's Villa Rosa, Inc. (D. C. Conn.), 198 F. Supp. 137 14
In re West Coast Cabinet Works (D. C. Calif.), 92 F. Supp. 636, footnote p. 659 5
In re Young (D. C. Wisc.), 171 F. Supp. 317 12
King v. United States, 379 U. S. 329, 85 S. Ct. 427, 13 L. ed. 2d 315 6
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Michigan v. Michigan Trust Company, 286 U. S. 334, 76 L. Ed. 1136, 52 S. Ct. 512 17
Penrose v. United States (D. C. Pa.), 18 F. Supp. 413 13
Simonson v. Grandquist, 369 U. S. 38, 7 L. Ed. (2d) 557, 82 S. Ct. 537 12
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Chapter XI 2, 3, 4, 9, 11
§ 64 (a) 4, 9, 16, 18, 19
§ 354 5
§ 39 (a) (5) 7
§ 302 11
§ 57j 14, 18
§ 378 21
Internal Revenue Code of 1939:
§ 3670 ..... 15, 22
§ 3671 ..... 15, 22
Revised Statutes of the United States, Section 3466 ..... 14, 16, 22
28 U. S. C., § 960 ..... 14, 15, 17, 21

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 650.

JOHN NICHOLAS, Trustee of the Estate of BEACHCOMBER MOTEL, INC., Bankrupt,

vs.

UNITED STATES OF AMERICA.

BRIEF

On Behalf of Jerome Kalishman, Trustee in Bankruptcy of Seymour Wallas and Company, Bankrupt, Respondent in Cause No. 711, October Term, 1965, as Amicus Curiae.

I.

INTEREST OF JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT.

Pursuant to the order of this Court of January 17, 1966, extending an invitation to the undersigned as respondent in the case of United States v. Kalishman, Trustee in

Bankruptcy, etc., No. 711, October Term, 1965, to submit a brief in this proceeding, as amicus curiae, the undersigned herewith submits this brief in support of John Nicholas, Trustee, etc., in Cause No. 650, October Term, 1965. We agree that the issues in both cases are identical.

II.

THE QUESTION PRESENTED.

The question at issue is whether the United States is entitled to recover from the assets of the bankrupt estate as part of a cost-of-administration claim, interest on a claim for unpaid withholding taxes incurred in a proceeding instituted under Chapter XI of the Bankruptcy Act by a debtor retained in possession.

The Eighth Circuit Court of Appeals decided the issue in favor of the undersigned in the case of **United States of America v. Jerome Kalishman, Trustee,** 346 Fed. (2d) 514.

III.

STATEMENT OF THE CASE.

In the Nicholas case, and in the Kalishman case also, debtor corporations filed petitions instituting proceedings under Chapter XI of the Bankruptcy Act. In each proceeding orders were made continuing the debtor in possession. The debtor in possession in each case operated its business and incurred liabilities for taxes after the petition was filed. The obligations to the United States for such taxes were not paid when due. This gave rise to a claim on behalf of the Government for interest during the period that the claims remained unpaid. Question has arisen as to whether the Government is entitled to interest. In each case the proceeding for an arrangement under Chapter XI failed, resulting in a subsequent adjudication in bankruptcy, and any burden resulting from the payment of interest will ultimately fall upon the general creditors of the bankrupt rather than upon the debtor or any successor of the debtor.

IV.

ARGUMENT.

A.

Where a Chapter proceeding in bankruptcy is superseded by an adjudication, all costs of administration including taxes incurred during the operations of the debtor-in-possession are on a parity.

We respectfully submit that the learned Judges of the Fifth Circuit Court in deciding the Nicholas case overlooked or did not give effect to the rule that where Chapter proceedings in bankruptcy are superseded by an adjudication, all costs-of-administration, including costs incurred during the operations of the debtor in possession, are on a parity. The Government does not have in such a case the priorities that it has under Section 64a of the Bankruptcy Act (11 U. S. C. § 104a). Throughout these two cases the Government has taken the position that the trustee should have paid forthwith the tax claims resulting from the operations of the debtor in possession without first ascertaining whether or not ultimately there would be sufficient funds to pay other costs-of-administration claims. Congress has not seen fit to extend to tax claims incurred during operations in a Chapter XI proceeding the same priority which the Government has in straight bankruptcy and in other insolvency proceedings.

Under the authorities it is clear that where a Chapter proceeding under the Bankruptcy Act is superseded by liquidation, all obligations including tax obligations incurred during the operation in the Chapter proceeding are on a parity as costs of administration.

State of Missouri v. Earhart (C. C. A. 8), 111 F. (2d) 992, cert. den. 311 U. S. 676, 85 L. Ed. 435, 61 S. Ct. 43;

In re Columbia Ribbon Co. (C. C. A. 3), 117 F. (2d) 999, 1001;

In re Lambertsville Rubber Co. (C. C. A. 3), 111 F. (2d) 45.

In the Earhart case the Court emphasized (111 F. (2d) at p. 995) that where a straight bankruptcy liquidation follows a Chapter proceeding the claim of a sovereign has no priority over other cost of administration claims, that on the question of priorities the provisions of the Bankruptcy Act govern.

The danger of a premature payment of a tax claim is ably discussed by Judge Biggs in the Lambertsville case.

See also:

In re West Coast Cabinet Works (D. C. Calif.), 92 F. Supp. 636, footnote p. 659.

B.

In bankruptcy, claims for priority are strictly construed, and usually the prompt payment of the principal amount of the government's claim is impossible.

Section 354 of the Bankruptcy Act (11 U. S. C., § 754) covers the filing of claims due and owing at the time of the filing of the original petition. There is no provision in the Act for the filing of cost of administration claims and no time limitation compelling the filing by any particular date. Neither is there any provision in the Bankruptcy Act requiring that the debtor-in-possession or any other party file a schedule or list of cost-of-administration claims, so the Referee and the trustee are totally in the dark until the close of the administration as to what obligations have been incurred. The usual procedure is for a trustee to apply for and cause to be published a "bar order", fixing a final date for the presentation of claims incurred while the debtor-in-possession was operat-

ing, but as a matter of fairness and equity a trustee should not attempt to bar the presentation of such claims until the estate is ready to be closed.

The point we make is, that until an estate is ready for closing neither the Bankruptcy Court nor the trustee of such an estate as this can possibly know whether there are sufficient funds on hand to pay, first, the expenses of the bankruptcy administration, and secondly, the cost-of-administration claims. Even at best some guessing has to be done if costs of administration are to be paid before the expenses of administration have been determined, for the claims of receivers, attorneys for the receivers, trustees, and attorneys for the trustees are all determined after notice to creditors at the final meeting. Then and not until then can an order of distribution be made.

It so happens that on occasions operations by a debtor-in-possession are unfortunately unsuccessful. If the trustee has paid any one or more of the cost-of-administration claims in full, and then it turns out that there are insufficient funds to pay all of such claims in full, some of such creditors have been treated unfairly and the trustee will be liable on his bond.

The decision in this Court in the case of **King v. United States**, 379 U. S. 329, 85 S. Ct. 427, 13 L. ed. 2d 315, has a bearing on the issues here before the Court. In the King case the Supreme Court held that a distributing agent in a Chapter XI proceeding was liable for failing to pay a claim of the United States in full. The United States was placed in jeopardy because other creditors having a lower priority were paid by the distributing agent. The liability fixed upon the distributing agent was a personal liability placed upon him.

We offer these comments. In the King case the distributing agent was held liable for paying second priority

claims ahead of first priority claims, and Justice White in a concurring opinion gave some weight to the fact that the distributing agent had knowledge of all the facts.

Thus it was held that one in a fiduciary capacity in a bankruptcy proceeding who pays second priority claims without ascertaining and paying first priority claims first, is liable. It is to avoid such a liability that a trustee in bankruptcy must necessarily withhold paying the government's claim until he can ascertain what the amount of the first priority claims are.

There is another important distinction. The court in the King case placed emphasis upon the fact that the distributing agent had sole control of the funds. That was not true in the case at bar, because where there has been an adjudication in bankruptcy the Referee's signature to checks is required. In the King case this does not appear to have been true. Under General Order in Bankruptcy No. 29 checks of a trustee must be countersigned by the judge or by a referee or by a clerk under an order made by the judge.

In that connection also we refer with emphasis to Section 39a (5) of the Bankruptcy Act (11 U. S. C., § 67a (5)), wherein it is provided that it is the duty of the Referee to declare dividends and cause to be prepared dividend sheets showing the dividends declared and to whom payable. Thus it will be seen that under the law the administration of funds in a straight bankrupty proceeding is under the control of the Court.

We cannot with assurance comment upon the situation in the Nicholas case, but we know that in the Kalishman case the Referee in Bankruptcy could not have permitted payment to be made to the United States because the Referee had no way of knowing, nor could the trustee have assured him, that there would be sufficient money in the estate to pay all other cost-of-administration claims

in full. The aggregate amount of cost-of-administration claims could not be determined until the estate was ready for closing.

The position of the Government is that it is the duty of the trustee to pay the tax claim in full at once even though there may not be enough funds on hand to pay other claims which are on a parity with the Government's claim.

If the United States was entitled to immediate payment of its cost of administration claim, all other holders of cost of administration claims, being on a parity, were likewise entitled to be paid at the same time, and what is a trustee to do, at the outset of his administration, before he has liquidated the assets of his estate, when he has no money in the bank?

The Government contends that under such circumstances the estate must pay interest. This must come out of the pockets of general creditors. We say that this attitude is unconscionable, and that the Bankruptcy Court as a court of equity should not sanction and enforce such a theory. The Government is seeking a priority to which it is not entitled even if it could be ascertained beyond doubt that the funds in the trustee's are sufficient to pay all cost-of-administration claims in full, because it demands to be paid before the Court is prepared to order payment of other claims on a parity with the Government's claim. This would be giving the United States a priority in time of payment not authorized by law.

The law does not sanction such a result.

An essential purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate and that no claimant is to be preferred over others unless the Bankruptcy Act by its terms requires such a result; and there is a rule that a priority of a claim against the

bankrupt for taxes due is to be strictly construed and that the burden of establisihng a priority is upon the claimant.

> Standard Oil Company v. Kurtz (C. C. A. 8), 330 F. (2d)178.

Priorities in bankruptcy are determined by the provisions of the Bankruptcy Act, and for the United States to establish a priority it must look to the provisions of that Act in order to establish it.

> Davis v. Pringle, 268 U. S. 315, 69 L. Ed. 974, 45 S. Ct. 549.

The Government argues the liability to pay tax incurred as a cost of administration is imposed upon the trustee in bankruptcy upon adjudication rather than upon the debtor-in-possession, but the liability upon the trustee is merely to recognize such a tax as a cost of administration, and if the funds are not sufficient, to pay the taxing authority its pro-rata share, and then only on order of court.

The Government completely ignores the 1952 amendment to Section 64a (1) of the Bankruptcy Act (11 U. S. C. § 104a (1)) which provides:

> "Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration * * *."

This points up the impossibility in many cases of paying expenses of administration claims under Chapter XI until the court is reasonably certain that there will be sufficient funds to pay priority expenses first, and then cost-of-administration claims in full.

C.

It is inequitable for a bankruptcy court to allow post-bankruptcy interest on tax claims where the burden of the payment would fall upon other creditors.

City of New York v. Saper, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554, established new law. Prior to the Saper case it was generally held that the United States was entitled to interest on its tax claim until payment was made or until the claim was barred by limitations. This was conceded in the opinion (336 U. S. at p. 333, 93 L. Ed. at p. 716). The real basis for the decision in the Saper case was, that it was inequitable to allow the Government interest on funds while those funds were in custodia legis. The court pointed out that to allow the Government interest on its claim would give the Government preferred treatment over other claimants and that there was nothing in the law which justified the conclusion that Congress intended to give the Government preferred treatment.

We recognize the fact that the Saper case involved post-bankruptcy interest on a claim which arose prior to bankruptcy. Other cases which we shall cite are similar in that respect. But the fundamental reasoning behind these cases applies to the case at bar. The philosophy of the Saper case is just as applicable here as to those cases which involve interest on claims existing at the time of bankruptcy.

The Saper case was followed in short order by **United States v. Edens,** 342 U. S. 912, 96 L. Ed. 682, 72 S. Ct. 357, and by **United States v. General Engineering & Manufacturing Co.,** 342 U. S. 912, 96 L. Ed. 682, 72 S. Ct. 358. In General Engineering the court was considering the allowance of a tax claim in a Chapter XI proceeding, and as in the Saper case, the claim arose prior to bankruptcy. The court held there should be no distinction between

ordinary bankruptcy and Chapter XI cases and cited in support of its conclusion Section 302 of the Bankruptcy Act (11 U. S. C., § 702), which provides that the provisions of Chapters I to VII of the Bankruptcy Act should apply to Chapter XI proceedings insofar as those provisions are not inconsistent with the provisions of Chapter XI.

From the plethora of litigation which continued to arise after the Saper case, apparently the Government was not satisfied with that decision. We shall not attempt to refer to all of the cases, but we shall cite some of them which evidence the philosophy of the courts and the reasoning behind the decisions.

State of New York v. Feinberg (C. C. A. 2), 204 F. (2d) 502, was a Chapter X proceeding in which the State of New York objected to a plan of reorganization that provided for the issuance of debenture bonds upon the State's claim for taxes to bear interest at the rate of only six percent per annum instead of a higher rate provided for by New York Law. The decision seems to hold that since the State of New York was not under the law entitled to interest at all after bankruptcy, it could not complain at the rate at which the rate of interest was revived.

The Sixth Circuit Court of Appeals in the case of **In re Inland Gas Corporation,** 241 F. (2d) 374, points out that so far as interest is concerned debts due for taxes are on a par with other debts of the bankrupt, and citing the Vanstone Bondholders case, to which we shall refer later, it was held that the court should consider and balance the equities between the parties.

In re Huff Co., 96 F. Supp. 701 (D. C., Mich.), is an important District Court decision in which the court held that in determining the right of the United States to interest the rule disallowing post-bankruptcy interest is an equitable one, not only in bankruptcy cases aimed at liqui-

dation but those involving Arrangements, and that the rule of the Saper case is one based upon equitable principles.

The Fourth Circuit Court of Appeals in **United States v. Harrington,** 269 F. (2d) 719, declares that the rule against post-bankruptcy interest upon tax claims is designed to prevent other creditors from suffering by the allowance of post-bankruptcy interest.

In a Fourth Circuit Court case decided prior to the Saper decision, **Littleton v. Kincaid,** 179 F. (2d) 848, the court held that interest should not be paid out of fund in custodia legis because of the inequality that would result. In the more recent Ninth Circuit case of **Beecher v. Leavenworth State Bank,** 192 F. (2d) 10, a farmer debtor proceeding, the reasoning of the court is along the same lines.

In **Columbia Aircraft Company v. United States,** 163 F. Supp. 932, Judge Learned Hand in a District Court decision held that the doctrine of the Saper case was applicable in an Arrangement case to the claim of the Government to set off its claim for interest against the debtor's claim for over-payment of taxes.

Another line of cases involves the Government's claim that where a tax lien had been perfected prior to bankruptcy, the doctrine of the Saper case is inapplicable. The courts have uniformly rejected this contention.

Simonson v. Granquist, 369 U. S. 38, 7 L. Ed. (2d) 557, 82 S. Ct. 537;

In re Cameron (D. C. Calif.), 166 F. Supp. 400, aff'd. 271 F. (2d) 129;

In re Young (D. C. Wisc.), 171 F. Supp. 317;

In re Kerber Packing Company (C. C. A. 7), 276 F. (2d) 245;

In re Industrial Machine & Supply Co. (D. C. Pa.), 112 F. Supp. 261.

In the Industrial Machine & Supply Co. case the court points out, as other decisions have done, that interest should not be allowed against funds held by an officer of the court since delay in distribution is an act of law and is a necessary incident in the administration of the estate.

There is some analogy between the situation before the Court and that which faced the courts in determining whether bondholders holding obligations which provided for interest, were entitled to have that interest run after bankruptcy, in accordance with the provisions of the bonds. Of course this question is well settled now, but at the outset the problem reached the Supreme Court of the United States, and it was held that a Bankruptcy Court as a court of equity had the power to determine how a debtor's assets should be distributed and that a court of bankruptcy sitting as a court of equity would not enforce the contractual obligation which provided for the running of interest.

Vanston Bondholders Protect. Com. v. Green, 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237.

The Government contended in its brief filed below* "that interest constitutes an integral part of a tax liability," and that taxes and resulting interest constitute a single liability. That may be true in some cases, but it is not an inexorable rule. There is responsible authority to the effect that penalties and interest are not taxes.

United States v. Mighell (C. C. A. 10), 273 F. (2d) 682;

United States v. Nelson (D. C. Ill.), 91 F. Supp. 557;

Penrose v. United States (D. C. Pa.), 18 F. Supp. 413;

Capital Bldg. & L. Asso. v. Commissioner, 23 B. T. A. 848.

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* Throughout this brief we are compelled to assume that the Government will in the main rely upon the authorities cited in its Eighth Circuit brief.

The Supreme Court in the Saper case did not recognize any such rule, nor is any such rule recognized in the many cases following the Saper case, such as

United States v. Harrington (C. C. A. 4), 269 F. (2d) 719;

In re Kerber Packing Company (C. C. A. 7), 276 F. (2d) 245.

A number of non-bankruptcy cases state that a penalty for non-payment of a tax is merged in the tax so that the two become a single liability, but that is not a rule in bankruptcy cases.

Bankruptcy Act, Sec. 57j, 11 U. S. C., § 93j;

In re Tom's Villa Rosa, Inc. (D. C. Conn.), 198 F. Supp. 137.

The real point we are dealing with here is whether there is any equitable ground for an exception to the general rule that post-bankruptcy interest is not allowable or payable out of the assets of the bankrupt estate.

D.

In determining whether interest on tax claims is allowable in bankruptcy proceedings, the provisions of the Bankruptcy Act rather than of the Internal Revenue Code govern.

The United States in support of its position has cited statutory provisions contained in 28 U. S. C., § 960, contending that they govern. It must be remembered that at the time of the Saper case there was in effect Section 3466 of the Revised Code of the United States, Comp. Stat., § 6372,* which gave the United States priority of the payment of tax claims in insolvency cases. It has been uniformly held that such a general provision of the Federal Law does not apply in bankruptcy, that to determine the

* See Appendix I.

rights of the parties including tax claimants we must look solely to the provisions of the Bankruptcy Act. In fact, that is the philosophy of the Saper case.

We note that 28 U. S. C. A., § 960, refers to "any officers and agents conducting any business under authority of a United States Court." We are also cognizant of the fact that there are decisions holding that the status of a debtor-in-possession is that of a trustee. But their positions are not exactly similar and should certainly appear dissimilar to a court of equity. Here the trustee did not operate a business. A trustee or a receiver operates under a bond, and is liable for his mistakes. A debtor-in-possession does not so operate, and his mistakes under appellant's theory would fall upon innocent parties.

The Saper case was decided as it was in spite of the provisions of the Internal Revenue Code of 1939 which governed the liability for taxes and provided that in case of delinquency the interest should be added as part of the tax (1939 Internal Revenue Code, §§ 3670, 3671).**

To consider further 28 U. S. C. A., § 960, we refer to a discussion of that section contained in **McColgan v. Maier Brewing Company** (C. C. A. 9), 134 F. (2d) 385. The decision points out that prior to the enactment of this section the law on the subject of the liability of court officers was in a choatic condition, and that this provision in the statute was not in terms or by implication intended to impair the principle that property in the custody of the Bankruptcy Court may not be subjected to liens while so held.

We submit that the purpose of the enactment of 28 U. S. C. A., § 124a, now designated as 28 U. S. C., § 960, was to fix the liability of officers of the court engaged in business, to require them to pay taxes as expenses of their operations or to assume a risk in the event of their failure

** See Appendices II and III.

so to do. The purpose of this enactment was not to penalize other creditors in the event of the failure of officers to perform their duties.

The holding in a New York District Court case, **In re Ten Eyck Co., Inc.**, 40 F. Supp. 270 stated:

> "Certainly it cannot be held that section 124a of Title 28 was intended to amend the Bankruptcy Act in any way or to prevail over it."

We have heretofore cited **State of Missouri v. Earhart** (C. C. A. 8), 111 F. (2d) 992,* which held that the court in classifying expenses of administration would be bound by the provisions of the Bankruptcy Act and not by the provisions of the Internal Revenue Code.

We have also referred to the case of **Davis v. Pringle**, 268 U. S. 315, 69 L. Ed. 974, 45 S. Ct. 549, decided some years prior to the Earhart case, a case in which the Government claimed that by reason of Section 3466 of the Revised Statutes, the United States had priority under Section 64a (5) over other creditors. At that time 64a (5) gave a fifth priority to:

> "Debts owing to any person who by the laws of the State or the United States is entitled to priority."

And it was argued that this section gave priority to the United States because of said Section 3466. It is extremely significant that this claim on the part of the Government was denied. (Since that time Section 64a (5) has been amended so as to include specifically the United States.) Justice Holmes in Davis v. Pringle based his finding upon **Guarantee Title & T. Co. v. Title Guaranty & S. Co.**, 224 U. S. 152, 56 L. Ed. 706, 32 S. Ct. 457, in which the court rejected the Government's claim that Section 3466 of the Revised Statutes established for the United States

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* Cert. den. 311 U. S. 676, 85 L. Ed. 435, 61 S. Ct. 43.

in bankruptcy proceedings a priority claimed by the United States.

We deny the contention of the United States argued below that under the decision of the lower courts the debtor-in-possession and the trustee would obtain an advantage over other businesses which is not sanctioned by Section 960 of 28 U. S. C. The Government in this case is seeking an advantage over other creditors holding cost-of-administration claims, because those creditors not only do not get interest on their claims, and, as we have pointed out, it is conceivable that the premature payment in full of the Government's claim would deprive other cost of administration creditors of money to which they are entitled; or if the Government's claim is not paid promptly, and interest is paid on it, this would give the Government interest where interest is not paid on other cost of administration claims.

The Government in its brief in the Eighth Circuit cited many cases of general application, interesting in themselves, but which do not touch upon the point at issue here. Some of them are non-bankruptcy cases. Most of them were decided prior to the Saper case, which in effect reversed holdings in many prior cases. Cited were such cases as **United States v. Killoren**, 119 F. (2d) 364, the rule of which was nullified by subsequent legislation. The Government also cited **Michigan v. Michigan Trust Company**, 286 U. S. 334, 76 L. Ed. 1136, 52 S. Ct. 512. This is not a bankruptcy case and all that it holds is that franchise taxes imposed by Michigan Statute must be paid as a cost of administration by an operating receiver incurring such taxes, that a claim for such taxes has priority over the claims of general creditors. We shall attempt to discuss only those cases which appear to have a direct bearing upon the problem here before this Court.

Boteler v. Ingels, 308 U. S. 57, 84 L. Ed. 78, 60 S. Ct. 29, involved a claim of the United States for a penalty im-

posed by state law for failure to pay license fees accruing during the operation of the bankrupt's business by a trustee in bankruptcy. The court held that since the penalty arose after the filing of the petition, Section 57j of the Bankruptcy Act (11 U. S. C., § 93j) had no application and that the state was not barred from collecting the penalty. The Boteler case was decided ten years before the Saper case and the court did not discuss the equities of the situation. **In re Chicago & N. W. Ry. Co.** (C. C. A. 7), 119 F. (2d) 971, decided in 1941, and **In re Flayton** (D. C. N. Y.), 42 F. Supp. 1002, decided in 1942, involving penalties, and **In re International Power Securities Corp.** (D. C. N. J.), 109 F. Supp. 544, decided in 1953, involving interest, followed the Boteler case. It does not appear to us that in any one of these cases the amount of the liability fell upon innocent creditors, and in none of them did the court discuss the equities of the situation. The Saper case was decided in 1949.

The Government also relied upon **Bruning v. United States**, 376 U. S. 358, 11 L. Ed. (2d) 772, 84 S. Ct. 906. The Bruning case did not involve the liability of the estate but of a debtor for post-petition interest. It was not concerned with payment out of the funds of an estate, and in its decision the Court stated:

> "The basic reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are the avoidance of unfairness as between competing creditors and the avoidance of administrative inconvenience."

The Government in discussing the Bruning case assumed that the language quoted above does not apply to the facts of this case. With that we disagree. Government's counsel assumed that taxes constitute a first priority and can be paid forthwith. For reasons we have stated elsewhere, taxes are not a first priority under the 1952 amendment to Section 64a (1) of the Bankruptcy

Act [11 U. S. C. 104a (1)], and in addition, must share pro-rata with other costs of administration.

And then there is **In re Airline-Arista Printing Corp.** (D. C. N. Y.), 156 F. Supp. 403.* In this Chapter XI case the debtor-in-possession was ordered to segregate amounts withheld from the wages of employees and to place these amounts in a special fund. The debtor-in-possession failed to comply with the court order. The court found (l. c. 404) that "At all times the debtor-in-possession had assets of a greater value than the amount of the taxes which it had withheld and these assets came into the hands of the trustee." The intermingling of such amounts with the general funds of the debtor-in-possession was not only wrongful under the Internal Revenue Code but contrary to the specific order of the court and the funds so withheld constituted the corpus of a trust. **The Airline-Arista case did not involve the payment of interest.** All that it held was that the Government had succeeded in tracing the corpus of a trust consisting of money withheld from the wages of employees, that therefore the Government was entitled to it, and that the provisions of the 1952 amendment to Section 64a (1) therefore did not apply.

E.

The claim of the United States for interest cannot be sustained on the theory of a trust since the Trustee in Bankruptcy acquired no trust funds.

It is not essential to the decision in this case to determine whether the principal amount of the Government's claim, i. e., its claim for the amount of the withholding taxes, were subject to a trust, whether or not the funds could be traced. But interest cannot be held subject to a trust because the interest was never in existence, and a

* Aff'd 267 F. (2d) 333.

trust cannot exist where there never was a corpus of the trust estate.

Restatement of the Law of Trusts (2d), § 202, Ch. 7, p. 451;

Restatement of the Law of Restitution, § 215, Ch. 13, p. 866;

Scott on Trusts (2d ed.), Vol. IV, p. 3325, § 52;

Bogert, "Trusts and Trustees" (2d ed.), § 921, Ch. 44, pp. 303-305.

For a cestui to recover from a fund on hand, he must trace into that fund:

Macey v. Roedenbeck (C. C. A. 8), 227 Fed. 346;

Mechanics & Metals Nat. Bank v. Buchanan (C. C. A. 8), 12 F. (2d) 891;

Farmers' Nat. Bank v. Pribble (C. C. A. 8), 15 F. (2d) 175;

Dudley v. Richards (C. C. A. 8), 18 F. (2d) 876;

Hanna v. Consolidated School Dist. No. 1 (C. C. A. 8), 78 F. (2d) 374.

The above decisions are in conformity with decisions of the Supreme Court. Mr. Justice Cardozo in a 1935 opinion used the following language: " * * * The money so returned is then subjected to a trust and though mingled with other money is viewed as retaining its identity so long as any portion of the fund is discovered to be intact. These fictions and presumptions * * * will not be so applied as to impose a trust relation upon moneys that have entered into 'the stream of the firm's general property' (cases cited) and are distinguishable no longer."

Adams v. Champion, 294 U. S. 231, 238, 79 L. Ed. 880, 884, 55 S. Ct. 399.

Two years later this Court reaffirmed the rule of Adams v. Champion, citing the following excerpt from 294 U. S., l. c. 239:

"Evidence is lacking that it (wrongful withdrawal) was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today."

Hoffman v. Rauch, 300 U. S. 255, 258, 81 L. Ed. 629, 631, 57 S. Ct. 446.

It is an abuse of language to describe an obligation, no matter how important it may be, as a trust obligation where there is no trust. The fact that there should be a trust does not miraculously create one when there is none. Wishing cannot make it so and only leads to bad law.

F.

Section 378 of the Bankruptcy Act has no application to the situation here before the court.

The Government has contended that in a situation where an adjudication follows a Chapter XI operation by a debtor in possession, the provisions of Section 378 of the Bankruptcy Act (11 U. S. C., § 778) require that the proceedings be conducted as far as possible as if an order of adjudication had been entered on the day when the petition was originally filed. We are not convinced that under the circumstances of this case that Section 378 is applicable. It does not require that in every instance the proceedings be conducted as if there had been an adjudication on the date of filing but only that this be done "so far as possible." It is difficult to see how the court can hold that Section 378 is applicable to something that did not begin to happen until after the date of filing. Under the 1952 amendment to Section 64a (1) expenses of liquidation must first be paid, as we have heretofore shown.

But even if this were true, the reasoning and logic of the Saper case and of the other cases that we have cited seem to apply. There is no valid or logical reason why a court of equity should hold that 28 U. S. C. A., § 960 has any

greater application to an operation under the Bankruptcy Act after adjudication than Sections 3670 and 3671 of the 1939 Internal Revenue Code and Section 3466 of the Revised Statutes had to an operation prior to adjudication.

V.

CONCLUSION

The equitable considerations which impelled the Supreme Court in the Saper case to protect the interest of creditors are just as applicable to the creditors in this case as in the Saper case. If it was inequitable to take interest from funds in custodia legis for the benefit of one creditor and to the detriment of others, as the Supreme Court found it was in the Saper case, it is just as inequitable in the case here before the Court.

Respectfully submitted,

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APPENDIX I.

Section 3466 of the Revised Statutes of the United States:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

APPENDIX II.

Section 3670 of the 1939 Revenue Act:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or additional to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

APPENDIX III.

Section 3671 of the 1939 Revenue Act:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."